# In the Supreme Court of the United States

OCTOBER TERM, 1968

---

No. 870

JAMES MICHAEL FORAN, APPELLANT

*v.*

JOHN WEINHOFF, ET AL.

---

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN*

---

## MOTION TO DISMISS OR AFFIRM

---

Pursuant to Rule 16 of the Rules of this Court, appellees move to dismiss this appeal or, alternatively, to affirm the judgment of the district court.

### STATEMENT

Appellant originally brought an action in the district court against the members of his local draft board, seeking to enjoin his induction. He alleged that the denial of his application for a conscientious objector classification was based on a letter from the Department of Justice which "blatantly misquoted

and deliberately misconstrued the holding of *United States* vs. *Seeger*, 380 U.S. 163, 173 (1965)." [1] The court dismissed the action on the ground that pre-induction review of Selective Service classifications was precluded by Section 10(b)(3) of the Military Selective Service Act, 50 U.S.C. App. 460(b)(3). No appeal was taken.

Appellant then brought the present action, also against the members of his local draft board,[2] seeking a declaratory judgment that Section 10(b)(3) is unconstitutional and asking that "defendants be per-

---

[1] The Department of Justice letter, attached to the complaint, contained the following passage, which was apparently the basis for appellant's allegation:

> [The registrant] told the Hearing Officer that he is an atheist and that he had stopped believing that there is a God. Section 6(j) of the Universal Military Training and Service Act, as amended, makes no provision for the exemption of atheists from military training and service. This "section excludes those persons who, disavowing religious belief, decide on the basis of essentially political, sociological or economic consideration that war is wrong and that they will have no part of it." *United States* v. *Seeger*, 380 U.S. 163, 173 (1965). At page 186 the court said, *inter alia*:
>
> > "The use by Congress of the words 'merely personal' seems to us to restrict the exception to a moral code which is not only personal but which is the sole basis for the registrant's ~~brief and is in no way~~ *relative to a Supreme Being.*"
>
> This registrant is an avowed atheist and does not appear to meet the requirements for exemption as a conscientious objector under Section 6(j) of the UMTSA, as amended.

[2] Judge Tehan, who had dismissed the first action, was also named as a defendant; but he was subsequently dropped by agreement of the parties.

manently enjoined from denying to the plaintiff his right to judicial review on the basis of said unconstitutional Act of Congress." A three-judge court was convened. The court stated that it was "seriously troubled by the procedural aspects of the instant action since substantially the basic question raised in the present case was resolved adversely to Mr. Foran in the previous action." (J.S. 10). The court, nevertheless, reached the merits, holding that Section 10(b)(3) is constitutional as applied to this registrant.

Appellant's induction order became effective, and on June 12, 1968, he refused to submit to induction. On September 11, 1968, he was indicted for violation of 50 U.S.C. App. 462(a). He pleaded not guilty, and is now awaiting trial.

## ARGUMENT

1. At the outset we note that while appellant cast his second action in terms of a request to enjoin the members of the board from asserting Section 10(b)(3) as a defense to his attempt to obtain judicial review, in actuality his action was to enjoin his induction rather than to enjoin enforcement of a federal statute. The validity of Section 10(b)(3) was merely drawn in question in order to meet the board's defense to appellant's action. In this situation it appears that a three judge court was not required to hear appellant's case and thus, a direct appeal to this court is not authorized. See *International Ladies' Garment Workers' Union* v. *Donnelly Garment Co.*, 304 U.S. 243.

2. Appellant's action clearly fails on the grounds of *res judicata* and mootness. In a previous action against the members of his draft board—who are the only appellees here—appellant unsuccessfully sought judicial review of his classification. This action was dismissed on the basis of Section 10(b)(3), and no appeal was taken. Appellant cannot now avoid the operation of *res judicata* by seeking to enjoin appellees from asserting the defense which they have already successfully utilized in defeating his prior action.

The action is now moot by reason of appellant's failure to submit to induction and the ensuing prosecution. The only remaining defendants are the members of the local board, and they have no authority, and, therefore, cannot be directed, to terminate the prosecution.

3. On the merits, the only issue appellant raises is the constitutionality of Section 10(b)(3) when applied to pre-induction judicial review of conscientious objector claims. In *Clark* v. *Gabriel*, No. 572, this Term, decided December 16, 1968, this Court held that Section 10(b)(3) is constitutional in such application. *Gabriel* controls this case.

Moreover, since appellant has refused to submit to induction and now faces prosecution, the case falls within the "familiar rule that courts of equity do not ordinarily restrain criminal prosecutions" since the defenses, constitutional or otherwise, "may be determined as readily in the criminal case as in a suit for an injunction." *Douglas* v. *Jeannette*, 319 U.S. 157, 163.

## CONCLUSION

For the foregoing reasons, this appeal should be dismissed or the decision of the district court should be affirmed.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*

EDWIN L. WEISL, JR.,
*Assistant Attorney General.*

MORTON HOLLANDER,
ROBERT V. ZENER,
*Attorneys.*

JANUARY 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 330656 419